

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RUSSELL L. GANN</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>USF DUGAN</b>	)	
Respondent	)	Docket No. 245,887
	)	
AND	)	
	)	
<b>TRAVELERS INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier request review of the December 23, 2003 Award by Special Administrative Law Judge J. Paul Maurin III. The Board heard oral argument on June 22, 2004.

**APPEARANCES**

W. Walter Craig of Wichita, Kansas, appeared for the claimant. William L. Townsley III of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed to provide a stipulation regarding claimant's average gross weekly wage. On June 24, 2004, the parties filed a stipulation with the Division of Workers Compensation wherein the parties stipulated to a \$766.96 average gross weekly wage.

**ISSUES**

It was undisputed that claimant suffered accidental injury arising out of and in the course of his employment with respondent. As a result of his back injury, the claimant herniated a disk and ultimately required two back surgeries with spinal fusion at L4-5 as a result of the second surgery. The claimant continued to have back pain and was diagnosed with chronic back pain. The Special Administrative Law Judge (SALJ) found the claimant to be permanently and totally disabled.

The sole issue raised on review by the respondent is the nature and extent of claimant's disability. Respondent concedes claimant is entitled to the \$100,000 maximum compensation payable for a permanent partial disability as a result of his work disability. But respondent argues that claimant's physical restrictions do not prevent him from engaging in substantial and gainful employment. Consequently, respondent argues claimant is not permanently and totally disabled.

Conversely, claimant argues that he has met his burden of proof to establish that he is permanently and totally disabled. Claimant argues the narcotic pain medication coupled with his physical restrictions render him unable to engage in any substantial and gainful employment. Moreover, claimant argues his physical restrictions alone eliminate his ability to engage in substantial gainful employment. Consequently, claimant requests the Board to affirm the SALJ's Award.

The sole issue before the Board is whether claimant is permanently and totally disabled and, if not, respondent concedes claimant's work disability would entitle him to the \$100,000 maximum permanent partial disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the SALJ's findings of fact are accurate and supported by the facts contained in the record. It is not necessary to repeat those findings in this Order. The Board adopts those findings as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

In summary, the claimant injured his back on January 14, 1999, when opening the door of the truck he drove to deliver freight. The door opened rapidly and jerked claimant's back. As claimant walked away in an attempt to work out the spasm in his back, he slipped on ice and fell.

Claimant received a long course of conservative treatment consisting of medication and physical therapy. Claimant's pain and symptoms persisted and an MRI revealed disk herniation at L4-5. On September 29, 1999, Dr. Leonard A. Klafta performed a laminectomy/discectomy at L4-5 on claimant's back. After the surgery claimant continued to have discomfort, pain and numbness. Claimant was treated with epidural steroid injections which did not relieve the persistent pain in his back.

Claimant was referred to Dr. Frank S. Letcher. A myelogram on March 15, 2000, revealed a recurrent bilateral herniated disk at L4-5. On March 28, 2000, Dr. Letcher performed a secondary bilateral partial laminectomy at L4-5 with bilateral facetectomy and

a bilateral secondary microdisectomy at L4-5 with posterior fusion at L4-5 using transpedicular segmental fixation at L4-5 using local bone graft.

After post-operative care and therapy the claimant continued to have low back pain with spasms and discomfort. Because of claimant's ongoing complaints Dr. Letcher referred claimant to Dr. Patrick L. Hughes for a psychiatric evaluation. On August 29, 2000, Dr. Hughes performed claimant's evaluation. Dr. Hughes concluded claimant was not having psychogenic pain and that claimant was experiencing bonafide chronic neuropathic pain. Dr. Hughes recommended a trial of medications which affect neuropathic pain syndromes.

Dr. Letcher concluded claimant had reached maximum medical improvement on October 25, 2000, and opined claimant suffered a 20 percent permanent partial functional impairment according to the *AMA Guides*<sup>1</sup>. Dr. Letcher further attributed 7 percent to claimant's work-related injury and the remainder attributable to claimant's pre-existing degenerative disease. Dr. Sami R. Framjee also concluded claimant was at maximum medical improvement on October 25, 2000, and opined claimant suffered a 15 percent whole body permanent partial functional impairment. Dr. Framjee imposed restrictions against claimant lifting greater than 30 pounds.

The claimant was referred to Dr. John F. McMaster for further treatment for his persistent back pain. Dr. McMaster tried multiple pain medications but prescribed them separately rather than concomitantly. Dr. McMaster also prescribed biofeedback, physical therapy and a TENS unit but none of the therapies provided claimant much relief. Dr. McMaster concluded that he had no further treatment modalities to offer and determined claimant had reached maximum medical improvement on April 13, 2001.

On approximately July 19, 2000, the claimant was released to return to work within Dr. Letcher's restrictions but his return to driving a truck resulted in an increase in his low back pain.<sup>2</sup> At some point claimant was also provided a four-hour workday with respondent doing office work as a dispatcher. The record is unclear when claimant began such accommodated work, but claimant was terminated from that position July 1, 2001, when respondent would no longer provide accommodated work.<sup>3</sup>

In June 2001 claimant was referred to Dr. Jon C. Parks for pain management treatment. Dr. Parks examined claimant on June 1, 2001, and began providing claimant

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>2</sup> It appears Dr. Letcher's restrictions were that claimant avoid repetitive bending and lifting, should not drive more than an hour at a time and should have a 30 pound weight limit. These restrictions were noted in the deposition of Dan R. Zumalt, Ex. 2.

<sup>3</sup> Dr. Scott Jahnke's February 19, 2001 office note indicates that by that date claimant was performing the accommodated office work.

with several medications to be used in conjunction. Because respondent withdrew authorization for Dr. Parks to provide claimant treatment, on August 9, 2001, a preliminary hearing was held on claimant's request for additional medical treatment. The Administrative Law Judge (ALJ) ordered that respondent provide claimant additional medical treatment with Dr. Parks.

Dr. Parks continued to treat claimant with medication. At his last visit with claimant on April 15, 2003, claimant was prescribed Methadone; Effexor XR; Elavil, Lortab for breakthrough pain; Celebrex, an anti-inflammatory; Zonegran and Zanaflex. Over the course of treatment, Dr. Parks adjusted the level of the various medications in order to obtain pain relief without side effects. Dr. Parks noted claimant described a significant reduction in his pain as a result of this treatment regimen.

Dr. Parks concluded claimant's chronic pain will continue for his lifetime and claimant will require either oral medications or other interventional therapy depending on claimant's tolerances and the progression of his pain. The doctor concluded claimant had reached maximum medical improvement in February 2002. Dr. Parks noted that he was not trained to provide ratings or restrictions and consequently did not provide either for claimant.

But Dr. Parks opined that the combination of claimant's continued pain and the pain medications he requires would make it highly unlikely claimant could find an employer that would hire him and most likely the claimant would not be able to work. Dr. Parks did agree claimant could most likely maintain a desk job. Moreover, Dr. Parks testified that the medications claimant was taking did not impair his cognitive abilities nor cause cognitive impairment.

Dr. Parks specifically testified that realistically, based on claimant's level of education and the type of work he had performed before his injury, it would be highly unlikely claimant would be able to find employment with his pain problem and the types of medications claimant takes. But on cross-examination, Dr. Parks agreed claimant could likely perform a sit-down job; claimant is not restricted from driving; claimant is not cognitively impaired due to his medications; and, the doctor did not know the level of claimant's education.

Claimant agreed his pain symptomatology had improved with Dr. Park's treatment but he did not believe he could sit in a chair for any length of time and some days he can hardly get out of bed. Claimant noted that he begins to lose feeling in his legs if he sits for too long. Claimant also noted that he could not drive for longer than 20 to 30 minutes.

At his attorney's request, claimant was examined by Dr. Richard S. Piazza on May 20, 2002. The claimant complained of chronic low back pain and an inability to sit longer than 10-15 minutes or stand longer than 10-15 minutes. Claimant further complained of intermittent numbness down both legs. Claimant noted he cannot bend over or drive longer than 30 minutes. Dr. Piazza diagnosed claimant with chronic lumbar back

pain in the L4-5 distribution with failed back syndrome. Dr. Piazza opined that claimant will require long term narcotic pain medications. Dr. Piazza imposed restrictions against claimant lifting greater than 10 pounds and not pushing or pulling greater than 25 pounds. And claimant should not bend, stoop, crawl or kneel as well as not use ladders. Dr. Piazza concluded claimant should not stand longer than 30 minutes without a 30 minute rest break and claimant should not sit longer than 30 minutes without a 30 minute break to walk and stretch.

Dr. Piazza further testified that although he offered restrictions it was nonetheless his opinion that claimant is unemployable because of his inability to perform tasks either with or without taking narcotic pain medication. Dr. Piazza opined that based on the *AMA Guides* claimant suffered a 25 percent permanent partial whole body functional impairment. On cross-examination, Dr. Piazza agreed that when narcotic pain medication is taken over a period of time the patient is able to function despite the effects of the medication.

At respondent's attorney's request, claimant was examined by Dr. Philip R. Mills on April 3, 2003. Claimant complained of continuing back pain which radiates into his legs and is worse with activity. Dr. Mills diagnosed claimant status post lumbosacral surgery times two with a fusion and chronic pain syndrome. Dr. Mills opined claimant suffers a 20 percent permanent partial whole body functional impairment based upon DRE Lumbosacral Category IV of the *AMA Guides*.

Dr. Mills placed restrictions on claimant of lifting 20 pounds maximum and lifting or carrying no more than 10 pounds. As far as claimant's ability to return to work the doctor placed claimant in the light work category and noted claimant would need to be able to change positions on an as-needed basis determined by his comfort level. And Dr. Mills agreed that claimant's daily usage of narcotic medication would pose a problem on some prospective jobs such as truck driving.

Dan R. Zumalt, respondent's vocational expert, met with claimant and prepared a list of tasks claimant had performed in the 15 years preceding his work-related injury. Mr. Zumalt opined claimant retained the capacity to earn between \$8 and \$9 an hour. Mr. Zumalt further opined claimant retained the ability to engage in substantial and gainful employment performing light or bench type assembly work or as a trucking dispatcher.

Jerry D. Hardin, claimant's vocational expert, also met with claimant and prepared a list of tasks claimant had performed in the 15 years preceding his work-related injury. Mr. Hardin opined that claimant is essentially and realistically unemployable as long as he's taking narcotic pain medication. But as a result of claimant's permanent physical restrictions Mr. Hardin opined claimant retains the ability to earn approximately \$280 per week. Mr. Hardin further agreed that claimant's physical restrictions alone would not warrant a finding claimant was permanently and totally disabled.

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>4</sup>

In *Wardlow*<sup>5</sup>, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this case, the claimant had two surgeries with the second surgery requiring placement of rods to fuse his back. Claimant cannot sit or stand in captive positions for extended periods of time. Claimant has a 12th grade education and has essentially only performed work as a truck driver which limits his transferrable job skills. It is undisputed claimant has chronic pain and is required to take narcotic pain medication. Moreover, claimant detailed his inability to maintain a body position without constantly changing positions. The facts in this case mirror the facts in *Wardlow* that resulted in the finding of permanent total disability.

It should be noted that the accommodated job claimant performed for respondent was not shown to be a job that existed in the open labor market, there is no indication claimant was able to perform it 8 hours a day and 4 hours a day does not equal substantial gainful employment.

The Board is not unmindful there is evidence that claimant's physical restrictions alone would not prevent claimant from returning to substantial and gainful employment. But, as noted by Dr. Piazza, without the narcotic pain medication the claimant's pain

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<sup>4</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>5</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

prevents him from engaging in physical activities and, in fact, claimant's pain worsens with increased physical activity. And there is no indication in the evidentiary record that claimant is a malingerer or feigning pain. Drs. Mills, Piazza and Parks do agree claimant suffers from chronic pain syndrome. And Dr. Mills agreed that claimant would need to alternate positions based upon his comfort level. Upon review of all the circumstances surrounding claimant's condition, the Board adopts and affirms the SALJ's finding that claimant is permanently and totally disabled.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Special Administrative Law Judge J. Paul Maurin III dated December 23, 2003, is affirmed.

The claimant is entitled to 202.85 weeks temporary total disability compensation at the rate of \$366 per week or \$74,243.83 followed by permanent total disability compensation at the rate of \$366 per week not to exceed \$125,000 for a permanent total general body disability.

As of July 26, 2004, there would be due and owing to the claimant 202.85 weeks of temporary total disability compensation at the rate of \$366 per week in the sum of \$74,243.83 plus 85.72 weeks of permanent total disability compensation at the rate of \$366 per week in the sum of \$31,373.52 for a total due and owing of \$105,617.35, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$19,382.65 shall be paid at \$366 per week until fully paid or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     W. Walter Craig, Attorney for Claimant  
       William L. Townsley III, Attorney for Respondent and its Insurance Carrier  
       Nelsonna Potts Barnes, Administrative Law Judge  
       J. Paul Maurin III, Special Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director